In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 802

FRANK COSTELLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO AMEND PETITION FOR A WRIT OF CERTIORARI

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner has filed (on April 15, 1960) a motion for leave to amend the petition for a writ of certiorari (filed March 18, 1960) so as to include a question of *res judicata* not raised in the petition as originally filed. No claim is made that petitioner was not aware of the issue at the time he filed his original petition. Indeed, no such claim could be made since petitioner injected the issue into the case at the district court level. It is the government's view that petitioner has shown no valid reason for raising the issue so belatedly—two days before the response to the petition for certiorari was due. Certainly, such a practice ought not be encouraged in the absence of a strong showing that special circumstances occa-

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sioned the delay. No such showing has been made. In addition, we point out that the question sought to be raised is not one which requires consideration by this Court.

1. The issue raised in petitioner's motion stems from the following facts. In a prior denaturalization action against petitioner, an affidavit of good cause was not filed simultaneously with the complaint. The district court, for other reasons not pertinent here, dismissed the cause without prejudice to the government's right to institute a new proceeding on the same ground. 145 F. Supp. 892, 897. This judgment was reversed by the court of appeals. 247 F. 2d 384. When the court of appeals' judgment was reviewed on certiorari, this Court reversed for a reason not considered by the court of appeals, *i.e.*, that the affidavit of good cause had not been filed with the complaint. 356 U.S. 256. The Court remanded the cause to the district court with directions "to dismiss the complaint." 356 U.S. 256.

After remand, the government presented to the district court a proposed order for dismissal "without prejudice." The district court, however, felt constrained by the mandate of this Court merely to enter an order of dismissal which did not specify whether it was with or without prejudice. The government did not appeal from this order (dated May 31, 1958).

After the instant denaturalization action had been instituted in the district court, petitioner moved to dismiss the complaint on the ground that dismissal of the prior proceeding barred the instant action on principles of *res judicata*. He argued that, under

Rule 41(b) of the Rules of Civil Procedure,[1] the order of dismissal, since it did not specify that it was "without prejudice," operated as an adjudication on the merits, and that the government, if it had wished to avoid such effect, should have appealed from the order of May 31, 1958. This contention was overruled by the district court on February 20, 1959, on the ground that the dismissal of the prior action was for lack of jurisdiction in the sense that the term jurisdiction is used in Rule 41(b). 171 F. Supp. 10, 22. On appeal, petitioner renewed his contention that the dismissal of the prior action operated as one with prejudice and therefore barred the present action. The court of appeals dealt with this contention in its opinion of February 17, 1960 (a copy of which appears as an appendix to the petition for a writ of certiorari). Without deciding what is or is not a dismissal for lack of jurisdiction within the purview of Rule 41(b), the court of appeals ruled that the dismissal of the prior proceeding, pursuant to the mandate of this Court, did not operate to bar the present action. It stated (Pet. 12a–13a):

> It seems to us that Rule 41(b) should be interpreted as applying only to cases in which the trial judge is exercising some discretion and is not merely acting mechanically pursuant to the direction of a superior court. There

[1] Rule 41(b) provides: "* * * Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits."

> must be a rule that a bare "dismissal" is to be interpreted as either with or without prejudice, and 41(b) provides this rule in all cases where the district court has a real discretion in the matter. But there is obviously no such need where the trial court's disposition of the case has been predetermined by a superior court. It would be a violation of the intention of all the courts concerned if the dismissal of the earlier complaint were held in this case to be a judgment on the merits. Appellant's arguments exalt pure technicalities to a wholly unwarranted degree. * * *

In the course of its opinion, the court of appeals also said (Pet. 11a):

> There may have been an error by the district court in its refusal to add the words, proposed by the government, that the dismissal of the complaint should be "without prejudice." However, this error, if it was an error, could have been corrected on appeal, and no appeal was taken from the district court's order of dismissal.

In the petition for a writ of certiorari, filed by petitioner on March 18, 1960, petitioner did not attack the ruling of the court of appeals that the prior dismissal did not bar the present action. His alleged reason for attempting to do so now, a month later, is that the Solicitor General, by filing a petition for a writ of certiorari in *United States* v. *Lucchese*, No. 789, has indicated that "the nature and effect of dismissals entered pursuant to the mandate of a higher court raise serious questions which should be resolved by this Court" (Motion, p. 3). As we show

below, however, the government has consistently taken the position in *Lucchese* that it was merely attempting to protect its rights in the event of an adverse decision by this Court in the present case, and indeed had already moved to dismiss its *Lucchese* petition before it was served with, or had heard about, petitioner's present motion.

2. In *Lucchese,* which arose in the Eastern District of New York, this Court, at the same time it remanded the first action against petitioner Costello, also remanded the denaturalization action involving Lucchese with directions to dismiss the complaint because of the failure to file an affidavit of good cause with the complaint. 356 U.S. 256. Upon remand, the government submitted to the district court a proposed form of order dismissing the complaint without prejudice. The district court, however, felt constrained by the mandate of this Court merely to enter an order of dismissal without any specification as to prejudice. This was done on July 16, 1959, and a motion for resettlement was denied on July 24, 1959.

At the time the district court order was entered in *Lucchese,* Costello had advanced the contention that the government's failure to appeal the order of dismissal entered in the first action against him barred the second. Indeed, this contention was before the court of appeals. In order to protect its right to bring a new action against Lucchese in the event of a ruling favorable to Costello's position, the government noted an appeal from the order in *Lucchese* insofar as it had failed to specify that the dismissal of the action was without prejudice. Lucchese made

a motion in the court of appeals to dismiss the appeal. Although the instant case had not been decided, a panel of the court of appeals (different from the panel which decided the instant case) dismissed the government's appeal in *Lucchese* on October 15, 1959, stating that there was no basis for the district court "to take action other than he did, namely, to comply with the clear command of the Supreme Court, without attempted embellishment."

Thereafter, on February 17, 1960, the court of appeals rendered its decision in *Costello,* including the statement quoted above (*supra,* pp. 3–4) that it may have been error for the district court not to have included the words "without prejudice," and that such error would have been correctible on appeal. Because this language seemed inconsistent with the statements of the panel of the court of appeals which decided *Lucchese,* the government moved in *Lucchese* for leave to file an untimely petition for rehearing of the dismissal of its appeal, but this motion was denied by the court of appeals on March 11, 1960. The last date on which the government could file a petition for a writ of certiorari in *Lucchese* was March 14, 1960.[2] Since, at that time, the petition for a writ of certiorari in the instant *Costello* case had not been served, the government, not knowing what issues Costello intended to raise, felt that it was necessary to file a petition for a writ of certiorari in *Lucchese,* so that, if this Court should decide to consider the *Costello* case, including the possible issue as to *res judicata,* the two cases, which are obviously inter-

[2] The full 60-day extension was sought and obtained.

related on this point, could be considered together. The government in its *Lucchese* petition made it clear, however, that it did not consider the point of sufficient importance to warrant bringing it before this Court as an independent matter. It said (Pet. No. 789, p. 9) that if "Costello does not file a petition for certiorari raising the *res judicata* issue (or if he files such a petition and it is denied as to this point) we would withdraw this present petition."

In accordance with this statement, the government, on April 15, 1960, moved under Rule 60(2) of the Rules of this Court to withdraw its petition for a writ of certiorari in *Lucchese,* No. 789. On April 18, 1960, it was served with the motion to amend the petition in the instant case. It therefore has moved in No. 789 to have action withheld on its motion to withdraw in that case until the present motion is determined or, if leave to amend the instant petition is granted, until the Court has acted on the *res judicata* issue in this case.

3. It is evident from the foregoing facts that the government's action in filing a petition for a writ of certiorari in *Lucchese* does not endow the *res judicata* issue in this case with any greater significance than it had when petitioner filed his original petition for a writ of certiorari without raising that issue. Petitioner's original judgment that the issue was not one warranting review by this Court is, we submit, a correct one.

As the court of appeals said in its opinion in the instant case, "It would be a violation of the intention of all the courts concerned if the dismissal of the

earlier complaint were held in this case to be a judgment on the merits." The government's only concern on this issue, here and in *Lucchese*, has been to make certain that the dismissal of a complaint for failure to file an affidavit of good cause, without a decision on the merits, pursuant to the mandate of this Court, not be considered a bar to an action for denaturalization properly instituted together with an affidavit of good cause—in other words, that no technical considerations, based on the wording of this Court's remand, shall operate to make the failure to file the preliminary affidavit a conclusive adjudication on the merits. The government believes that the intention of this Court not to adjudicate the merits was so clear when it directed dismissal for failure to file an affidavit with the complaint that it was within the authority of the district court to make that intention express by entering an order dismissing the complaint "without prejudice."[3] But whether the district court did so or not, the only question that the government regards as significant is that the intention of this Court in its remand be effectuated. Since this Court clearly did not intend its adjudication to be on the merits, and since the court of appeals below has recognized and given effect to that intention, we

[3] An appellate court's mandate, while of course binding on a lower court as to all matters encompassed therein, leaves the lower court free as to any issue within its jurisdiction which was not settled by the higher court's decision. *Sprague* v. *Ticonic Bank*, 307 U.S. 161, 168; *In re Sanford Ford & Tool Co.*, 160 U.S. 247, 255–256; *Christoffel* v. *United States*, 214 F. 2d 265 (C.A.D.C.), certiorari denied, 348 U.S. 850.

do not believe that there is an issue requiring resolution by this Court.

It is therefore respectfully submitted that the motion to amend the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

APRIL 1960.

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